

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

TERRELL MARKS,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 192638

Wayne Circuit Court

DUAYNE CHILDRESS, a/k/a DUANE  
CHILDRESS,

LC No. 95-505940 NO

Defendant-Appellee.

---

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan\*, JJ

MARKEY, J. (dissenting.)

Plaintiff appeals by right from the trial court's summary disposition order in favor of defendant on the basis of the wrongful conduct rule, *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995). I respectfully dissent from the majority's conclusion that the trial court erred in barring plaintiff's cause of action pursuant to the wrongful conduct rule.

As our Supreme Court stated in *Orzel, supra* at 558, the wrongful conduct rule generally applies to bar the plaintiff's claim where the action is based, in whole or in part, on plaintiff's own illegal conduct:

“[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party. [1A CJS, Actions, § 29, p 386. See also 1 Am Jur 2d, Actions, § 45, p 752.]”

When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common-law maxim, known as the “doctrine of in pari delicto” generally applies to also bar the plaintiff's claim:

---

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

“[A]s between parties in *pari delicto*, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them. [1A CJS, Actions, § 29, p 388. See also 1 Am Jur 2d, Actions, § 46, p 753.]”

Both of these maxims are encompassed in the “wrongful conduct” rule. *Orzel, supra*.

Although the majority does not address this point, I believe that plaintiff, as the person who stole the firearm, is *in pari delicto* with defendant, who is a receiver and concealer of stolen property. Plaintiff also admitted that he held the gun while sitting in Grover’s car, where it was being secreted for safe keeping. Further, plaintiff was uncertain but believed that defendant carried the gun from Grover’s car into the house. Also, defendant did not deny knowing that the gun was being kept in Grover’s car. As between parties such as plaintiff and defendant, the law will not lend itself to afford relief to one as against the other but will leave them as it finds them. *Orzel, supra* at 558.

In the case at bar, although plaintiff denied touching the gun on the day he was shot, he was in repeated contact with it before the shooting, and he knew it was brought into the house from Grover’s car. Plaintiff also knew that the gun was loaded. Given that the boys had access to the gun in the glove compartment of Grover’s car, plaintiff, defendant, and Grover were arguably in common possession of the gun; therefore, all three boys were also receivers and concealers of the stolen gun.

Because possession of the firearm underlies any claim for liability in this case, public policy should preclude this Court from lending its aid to plaintiff, who, in effect, bases his cause of action on his own illegal conduct. *Manning v Bishop of Marquette*, 345 Mich 130; 76 NW2d 75 (1956). I believe that permitting this suit to proceed would assist a wrongdoer in endeavoring to profit or at least receive compensation as a consequence of his illegal acts and tend to cause the public to view the legal system as a mockery of justice. *Stopera v DiMarco*, 218 Mich App 565, 569; 554 NW2d 379 (1996); *Imperial Kosher Catering v Travelers Indemnity Co*, 73 Mich App 543, 545-546; 252 NW2d 509 (1977).

Furthermore, I do not believe that any of the exceptions to the wrongful conduct rule apply here. *Orzel, supra* at 561-577. First, plaintiff’s conduct, larceny of a firearm, is prohibited under a criminal or penal statute, MCL 750.356; MSA 28.588. Second, plaintiff’s larceny of the gun was a proximate cause of his injuries. But for his stealing the gun, which was hidden in his friend’s car and eventually ended up in defendant’s hands, these injuries would not have occurred. Plaintiff argues that because he could have been injured in the same manner with any other similar gun, there is no proximate causation to justify applying the “wrongful conduct” rule. Considering the circumstances of how defendant obtained the gun and how the accident occurred, however, I find that argument unpersuasive. Indeed, plaintiff’s illegal act was not “merely incidentally or collaterally connected” with the shooting. *Orzel, supra* at 564-565, 567. Rather, plaintiff’s “injury [is] traceable to his own breach of the law and such breach [is] an integral and essential part of his case,” rather than merely a condition of plaintiff’s injury. *Id.* at 565, quoting *Manning, supra* at 136, quoting *Meador v Hotel Grover*, 193 Miss 392, 405-406; 9 So 2d 782 (1942). There was no evidence supporting the assertion that these boys had access to or possessed other handguns. Thus, the majority’s conclusion that the theft and hiding of the gun in Grover’s car was only “collaterally or incidentally connected to” the shooting is unpersuasive. In

short, absent the presence of the stolen gun in Grover's car, defendant would not have had the instrumentality to shoot plaintiff.

Third, defendant's culpability was not so much greater than plaintiff's to mandate the conclusion that the parties were not in *pari delicto*. *Stopera, supra* at 569-572. Finally, the statutory purpose doctrine is inapplicable here. *Orzel, supra* at 561-571.

Although plaintiff is attempting to link the concept of causation contained in the wrongful conduct rule with the causation requirement of his own negligence action, I would decline his invitation to do so without authority to support this novel approach. Under the facts of this case, I cannot say that plaintiff's theft of the gun was so attenuated from the shooting as to make the wrongful conduct rule inapplicable here. Moreover, none of the cases plaintiff cites contain any temporal requirement or limitation on the time that may elapse between criminal acts so as to avoid application of under the wrongful conduct rule, and I would hesitate to formulate such a rule in this case. Accordingly, I agree with the trial court that "plaintiff's illegal conduct put into motion a series of events that led to his injury" and would affirm the trial court's grant of summary disposition.

/s/ Jane E. Markey